IN THE SUPREME COURT

Appeal from the Court of Appeals
Honorable Michael J. Talbot

REBECCA GROSSMAN, as Personal Representative of the Estate of FRED GROSSMAN, Deceased,

Plaintiff-Appellee,

vs

Docket No. 122458

OTTO W. BROWN, M.D., SINAI HOSPITAL, an assumed name of SINAI HOSPITAL OF GREATER DETROIT, a Michigan non-profit corporation,

Defendants-Appellants,

and

ROBERT MURRAY, M.D.,

Defendant.

_____/

BRIEF ON APPEAL – APPELLEE

**** ORAL ARGUMENT REQUESTED ****

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STATUTES AND OTHER AUTHORITES

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JURISDICTIONAL STATEMENT

The Appellee accepts the Appellants' statement of the date and nature of the Order appealed and the jurisdictional statement.

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STATEMENT OF QUESTIONS PRESENTED

1. **Whether Plaintiff's expert is qualified under MCL 600.2169 to sign Plaintiff's Affidavit of Merit required under MCL 600.2912d?**

   Plaintiff argues the answer is "Yes".

   Defendants SINAI HOSPITAL and DR. BROWN says the answer is "No".

   The Trial Court has answered "Yes".

   The Court of Appeals did not address the issue.

II. **Whether Plaintiff had a reasonable belief that Plaintiff's expert was qualified to sign Plaintiff's Affidavit of Merit pursuant to MCL 600.2169?**

   Plaintiff states the answer is "Yes".

   Defendant says the answer is "No".

   The Trial Court has answered "Yes".

   The Court of Appeals did not address the issue.

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COUNTER-STATEMENT OF FACTS

This is a medical malpractice action brought by REBECCA GROSSMAN, as Personal Representative of the Estate of FRED GROSSMAN, Deceased, arising out of the negligent care provided by DR. OTTO BROWN, DR. ROBERT MURRAY and SINAI HOSPITAL.

This Appeal is based upon an Order by Wayne County Circuit Court Judge Kaye Tertzag denying Defendants' Motion to Strike Plaintiff's Affidavit of Meritorious Claim and for Partial Summary Disposition on June 6, 2002.

BACKGROUND FACTS

On November 7, 1997, FRED GROSSMAN presented to SINAI HOSPITAL and DR. OTTO BROWN for the purposes of undergoing elective carotid endarteretomy **(Appendix, p. 5a, Complaint ¶ 10)**. At the time of his admission, lab results indicated that Mr. GROSSMAN suffered from low hemoglobin, bradycardia and arrhythmia **(Appendix p. 5a, Complaint ¶¶ 11-13)**. The carotid arterial endarteretomy surgery was performed by DR. BROWN on or about November 7, 1997 **(Appendix p. 6a, Complaint ¶ 18)**. DR. MURRAY provided anesthesia services **(Appendix p. 5a, Complaint ¶ 18)**. Postoperatively, Mr. GROSSMAN was bleeding internally and had to be rushed back to surgery **(Appendix p. 6a, Complaint ¶ 19)**. Mr. GROSSMAN's postoperative lab results indicated abnormal results including his hemoglobin and hematacrit **(Appendix, p. 26a, Complaint ¶ 20).** DR. BROWN was notified but did nothing **(Appendix p. 6a, Complaint ¶¶ 19-21).**

From the time Mr. GROSSMAN's surgery concluded, he rapidly declined. Mr. GROSSMAN was transferred to a surgical intensive care unit where he continued to show signs of bradycardia, low hemoglobin and low hematacrit counts **(Appendix p. 7, Complaint ¶ 29)**. Though, Mr. GROSSMAN's condition had severely declined, he was transferred to a general surgical floor on November 8, 1997 **(Appendix p. 6a, Complaint ¶ 22)**. Subsequently, Mr.

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GROSSMAN complained of throat irritation and swelling, however, the nursing staff failed to properly assess Mr. GROSSMAN's condition, nor did the nursing staff notify a physician **(Appendix p. 6a, Complaint ¶ 24)**.

On November 9, 1997, Mr. GROSSMAN could not sleep and was medicated with a sleeping medication. **(Appendix p. 7a, Complaint ¶ 27).** At 1:55 a.m., on November 9, 1997, Mr. GROSSMAN was found unresponsive and was transferred to the Surgical Intensive Care Unit under Code Blue status **(Appendix p. 7a, Complaint ¶ 28)**. While Mr. GROSSMAN showed signs of a heart rate and blood pressure, no neurological responses were ever regained. **(Appendix p. 7a, Complaint ¶ 30)**. On November 9, 1997, at approximately 4:29 p.m., FRED GROSSMAN died as a direct result of the negligent care provided by DR. OTTO BROWN, DR. ROBERT MURRAY, and SINAI HOSPITAL. **(Appendix 7a, Complaint ¶ 32-33)**.

On October 13, 2000, Plaintiff served a Notice of Intent to File a Claim alleging that Defendants were negligent by failing to properly evaluate Mr. GROSSMAN preoperatively and failed to provide the appropriate postoperative treatment, ultimate resulting in his untimely death. **(Appendix p. 33a).**

On April 19, 2001, Plaintiff filed her Summons and Complaint against DR. OTTO BROWN, DR. ROBERT MURRAY and SINAI HOSPITAL. Attached to Plaintiff's Complaint was the required Affidavit of Meritorious Claim in compliance with the requirements of MCL 600.2912d. Plaintiff's Affidavit of Meritorious Claim was signed by Dr. Alex Zakharia, a specialist in vascular surgery. **(Appendix p. 62a).**

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MOTION TO STRIKE AND FOR PARTIAL SUMMARY DISPOSITION

On or about August 21, 2001, Defendants filed a Motion to Strike Plaintiff's Affidavit and for partial summary disposition pursuant to MCR 2.118(C)(7). **(Appendix p. 23a)** DR. BROWN alleged that Dr. Zakharia was not qualified to sign Plaintiff's Affidavit of Merit

because he failed to meet the qualifications in MCL 600.2169, which sets forth the qualifications for an expert witness in a medical malpractice case. Plaintiff filed her response on or about October 11, 2001. **(Appendix p. 76a)**

After an initial hearing on October 14, 2001, a hearing was held on June 6, 2002, before the Honorable Kaye Tertzag in Wayne County Circuit Court. Oral arguments were heard on Defendant's Motion to Strike Plaintiff's Affidavit of Meritorious Claim and for Partial Summary Disposition. Judge Tertzag denied Defendant's Motion holding that Dr. Zakharia was both qualified to sign Plaintiff's Affidavit of Merit or in the alternative, if he was not qualified, Plaintiff had a reasonable belief that Dr. Zakharia was qualified at the time the Affidavit of Merit was filed satisfying the statutory requirements of MCL 600.2912d.

COURT OF APPEALS PROCEEDING

Defendants filed an Application for an Interlocutory Leave to Appeal on or about June 27, 2002, with the Court of Appeals for the State of Michigan. Thereafter, Plaintiff filed a timely response. Subsequently, on September 12, 2002, the Court of Appeals issued an Order denying the Application for Leave to Appeal for the reason that the Court was not persuaded of the need for immediate appellate review.

SUPREME COURT PROCEEDINGS

On or about October 3, 2002, Defendants filed an Application for an Interlocutory Leave to Appeal. Defendants then filed Motions for Immediate Consideration and Motions for Stay of Trial.

On January 24, 2003, this Honorable Court issued an Order granting the Motion for Immediate Consideration and a stay of proceedings. On March 25, 2003, the Court issued an Order granting the Defendants' Application limited to the following issues:

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1. Whether a standard of care expert witness is qualified under MCL 600.2169(1)(a) to present expert testimony against a defendant physician where the proffered witness does not possess the safe certificate of special qualifications as the defendant physician;

2. The proper construction of the word "specialty" in the first sentence of MCL 600.2169(1)(a);

3. The proper construction of the phrase "that specialty" in the second sentence of MCL 600.2169(1)(a); and

4. Whether the circuit court erred in denying the defendant's Motion to Strike and for partial summary disposition.

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SUMMARY OF THE ARGUMENTS

At the time of the malpractice alleged in the current action, DR. OTTO BROWN was practicing vascular surgery. Vascular surgery is a sub-speciality of general surgery and the American Board of Surgery. The American Board of Surgery allows physicians who have been "board-certified" in surgery to sit for an examination and receive a certificate of special qualifications in vascular surgery. However, a sub-speciality nor a certificate of special qualifications rise to the level of "board-certified" in the expert witness statute MCL 600.2169.

Plaintiff was required to file an affidavit of merit with their initial Complaint. The affidavit was required to be signed by a health professional who was or who Plaintiff reasonably believed was qualified under MCL 600.2169 in the same speciality as the Defendant, DR. OTTO BROWN. Plaintiff's Affidavit of Merit was signed by, Dr. Alex T. Zakharia, a specialist in the field of vascular surgery.

Since, a certificate of special qualification is not the same as "board certified", Plaintiff complied with the requirements of MCL 600.2912d and 600.2169 and the Trial Court correctly denied Defendant's Motion to Strike Plaintiff's Affidavit of Merit and Partial Summary Disposition.

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ARGUMENTS

1. Plaintiff's expert is qualified under MCL 600.2169 to sign Plaintiff's Affidavit of Merit required under MCL 600.2912d.

The Trial Court appropriately denied Defendants' Motion to Strike Plaintiff's Affidavit of Meritorious Defense and for partial summary disposition. Both Plaintiff's expert, Dr. Alex Zakharia, and the Defendant, DR. OTTO BROWN, have identical board certifications for the purposes of MCL 600.2169. DR. BROWN is a board certified general surgeon as is Dr. Alex Zakharia. DR. BROWN holds himself out as a specialist in vascular surgery. Dr. Zakharia specializes in vascular surgery, as well as thoracic surgery and cardiovascular surgery. DR. BROWN has obtained a Certificate of Special Qualifications in Vascular Surgery, which is granted by the American Board of Surgery. No Board of Vascular Surgery or board certification in vascular surgery exists. Thus, the Trial Court's denial of Defendants' Motion to Strike and for Partial Summary Judgment should be affirmed.

A. Standard of review.

Decisions on motion for summary disposition are subject to a *de novo* review. *Miller v Farm Bureau Mutual Insurance Co*, 218 Mich App 221; 553 NW2d 371 (1996). Statutory interpretation is also a question of law which is ruled *de novo*. In re *Jaguars*, 224 Mich App 359; 568 NW2d 837 (1997).

B. Introduction to the 1993 tort reform legislation.

In an effort to reform tort law, the Michigan Legislature significantly amended the revised Judiciary Act, MCL § 600.101 *et seq*. in 1994. The statute, originally enacted in 1986, prescribes the requisite qualifications an expert witness must have in order to provide testimony in a medical malpractice action. The requirements of the 1993 Act are designed to insure the expert possesses the necessary familiarity with what was customarily within the specialty, or among

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general practitioners at the time in question. The requirements are that a majority of the expert's clinical practice is contemporaneous with the time of the alleged malpractice in the same specialty as the alleged malpractice.

To begin a medical malpractice case in the State of Michigan, a plaintiff must first file a notice of intent required by MCL § 600.2912b. The notice of intent must include a statement of facts, the applicable standard of care, how the standard of care was breached, the actions which should have been taken, and the damage which resulted. Upon service of plaintiff's notice of intent, plaintiff must wait a minimum of 182 days before filing a complaint. Pursuant to MCL § 600.2912d, an affidavit of meritorious claim must accompany the complaint. The plaintiff's affidavit of meritorious claim must be signed by a health care professional whom the plaintiff's attorney *reasonably believes* meets the requirements set forth in § 2169 of the Act. (Emphasis added). The health care provider then must also file an affidavit of meritorious defense pursuant to MCL § 600.2912e.

Both the affidavit of meritorious claim and affidavit of meritorious defense, must be signed by a health professional meeting the requirements of § 2169 and must include the factual basis for the health professional's belief, the standard of practice, and the manner in which the alleged injury was or was not related to the care and treatment provided.

C. Background information regarding the board certification process.

The American Board of Medical Specialties ("ABMS"), is the umbrella organization for the 24 approved medical specialty boards in the United States. Established in 1933, the ABMS serves to coordinate the activities of its member boards and to provide information to the public, the government, the profession and its members concerning issues involving specialization and certification in medicine. The ABMS recognizes "surgery, which is governed by the American

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Board of Surgery (ABS"), as one of its 24 member boards.[1] Additionally, the ABMS incorporates six types of surgery as separate and distinct in equal number of boards:

1. General surgery.
2. Colon and rectal surgery.
3. Neurological surgery.
4. Orthopedic surgery.
5. Plastic surgery.
6. Thoracic surgery.

Yet, even with the numerous specialities, the ABMS recognizes, including six distinct surgical boards, **no board of vascular surgery is recognized.** (Emphasis added).

Thus, for ABMS purposes, vascular surgery is a subspecialty of the ABS. American Board of Medical Specialties < http://www.abms.org > (last accessed on June 18, 2003).

The American Board of Surgery was founded in 1937 for the purpose of certifying those found to be qualified after meeting special requirements and in completing an examination process. The ABMS is an independent, nonprofit organization with world wide recognition. American Board of Surgery, Inc. < Http://www.absurgery.org/home. html > (last accessed on June 18, 2003).

The ABS interprets the term "general surgery" in a comprehensive but specific manner. "General surgery" is a discipline having a central core of knowledge embracing anatomy,

---

[1] The 23 other member boards of the ABMS, besides surgery, include: (1) imagery and immunology; (2) anesthesiology; (3) colon or rectal surgery; (4) dermatology; (5) emergency medicine; (6) family practice; (7) internal medicine; (8) medical genetics; (9) neurological surgery; (10) nuclear medicine; (11) obstetrics and gynecology; (12) ophthalmology; (13) orthopedic surgery; (14) otolaryngology; (15) pathology; (16) pediatrics; (17) physical medicine and rehabilitation; (18) plastic surgery; (19) preventive medicine; (20) psychiatry and neurology; (21) radiology; (22) thoracic surgery; and (23) urology.

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physiology, metabolism, immunology, nutrition, pathology, wound healing, shock and resuscitation, intensive care and neoplasia, which are common to all surgical specialties. *Id.*

A "board certified" general surgeon has acquired during training specialized knowledge and experience related to the diagnosis, preoperative, operative and postoperative management, including the management of complications, in nine primary components of surgery, **all of which are essential to the education of a broadly based surgeon**. (Emphasis added). These nine primary components of surgery are as follows:

1. Arimentary tract.
2. Abdomen and its contents.
3. Breast, skin and soft tissue.
4. Head and neck.
5. **Vascular system, excluding the intracranial vessels and heart.**
6. Endocrine systems.
7. Surgical oncology.
8. Comprehensive management of trauma.
9. Complete care of critically ill patients. *Id.* (Emphasis added).

To receive an ABS certification in surgery, candidates must pass a qualifying written exam, then a subsequent certifying oral examination in general surgery. *Id.* One key distinction between a board certification and a subspecialty certificate is that to receive a board certification, a doctor must complete a residency for prescribed number of years, whereas to receive a certificate of special qualification, a candidate need only attend a fellowship and submit a list of completed surgeries. **(Appendix 138a and 144a)**

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In addition to a general surgery examination, the ABS offers those candidates who have successfully completed the general surgery examination process (and are therefore fully board certified by the ABS in "surgery"), the opportunity to earn a certificate of special qualification upon the successful completion of another round of written examinations filed by oral examination in the following four categories:

1. Pediatric surgery;
2. Vascular surgery;
3. Surgical critical care; and
4. Surgery of the hand.

Thus, those doctors who are already ABS, board certified in surgery, and have demonstrated the requisite competency of surgery, including substantial knowledge of the vascular system, and who are looking for another piece of paper to frame on their office wall, can pay $1,350.00 to take another exam in one of the remaining four subspecialities. Upon successful completion of a subsequent ABS subspecialty, candidates then receive a certificate of special qualification. American Board of Surgery, Inc. < http://www.absurgery.org/home. html > (last accessed on June 18, 2003).

D. Interpretation of Statutory Construction.

The rules of statutory construction are well established. The foremost rule, in construing a statute, is to discern and give effect to the intent of the Legislature. *Murphy v Michigan Bell Telephone Co*, 447 Mich 93, 98; 523 NW2d 310 (1994). *See also, Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). This task begins by examining the language of the statute itself. The words of the statute provide, "the most reliable evidence of its intent . . ." *United States v Turkette*, 452 US 576, 593; 101 S.Ct. 2524; 69 L.Ed2d 246 (1981). If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly

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expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. *Tryc v Michigan Veteran's Facility,* 451 Mich 129, 135; 545 NW2d 642 (1996). Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain Legislative intent. *Luttrell v Dep't of Corrections*, 421 Mich 93; 365 NW2d 74 (1984). [*Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999)].

In interpreting statutory language, this Court must consider the "plain meaning of the critical word or phrase" as well as its "placement and purpose" in the statute. *Id* at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S.Ct. 501; 133 L.Ed2d, 472 (1995). Further, as Justice Markman, writing for the majority of our Supreme Court recently explained in *Robertson v Daimler Chrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002), we must construe the statute at issue in a manner that does not ignore, render, nugatory or treat as surplusage, specific words in the legislation. *Brown v Genesee County Board of Commissioners* (After remand) 464 Mich 430, 437; 628 NW2d 471 (2001); *Decker v Flood*, 248 Mich App 75, 82; 638 NW2d 163 (2001). Likewise, where the statute does not define a word, we are compelled to ascribe to it the common and ordinary meaning, MCL 8.3a; *Harold's Co v Bay City*, 463 Mich 111, 118; 614 NW2d 873 (2000); *Massey v Mandel*, 462 Mich 375, 380; 614 NW2d 70 (2000). However, where the word is a "legal term of art" that has acquired a particular meaning in the law, we are required to abide by that definition. *Id* at 386 (*Corrigan J., concurring); People v Law*, 459 Mich 419, 425, N8; 591 NW2d 20 (1999).

Moreover, in *Brown*, *supra* at 437, our Supreme Court, quoting its earlier decision in *Tyler v Livonia Public Schools*, 459 Mich 382, 390-391; 590 NW2d 560 (1999), recently instructed lower courts to ascertain the meaning of a word by examining it carefully in its proper context in the statute:

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> Contextual misunderstanding of statutes is generally grounded in the doctrine of Nosciturasocis: it is known from its associates, See *Black's Law Dictionary* (6th Ed., p 1,060). This doctrine stands for the principal that a word or phrase is given meaning by its content or setting.

Under a strict statutory application of MCL 600.2912d and more importantly, 600.2169, Dr. Zakharia clearly meets the qualifications set forth to sign Plaintiff's Affidavit of Merit against Defendant, DR. OTTO BROWN.

E. The Expert Witness Statute Requires That a Doctor Be Practicing in the Specialty in which the Malpractice was Committed to Sign Plaintiff's Affidavit of Merit.

An expert witness to be qualified to provide expert testimony on the appropriate standard of care must be licensed as a health professional in this State or another state and specialize at the time of the occurrence in the same specialty which is the basis for the action. Furthermore, if the defendant is "board certified" in the specialty where the malpractice occurred, the expert witness must also be "board certified" in that specialty. The pertinent language in § 2169 states:

> 1. In an action alleging medical malpractice, a person shall give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this State or another state and meets the following criteria:
>
> (a) if a party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or whose on behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

Therefore, the statute with regards to a specialist is broken into two parts. One, if a doctor is "board certified" in the specialty which the basis of the occurrence is alleged, the doctor signing an affidavit of merit must be "board certified" in that same specialty. However, if a

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doctor is a specialist, but that doctor is not "board certified" or none exists (as in the current action), then the doctor signing the affidavit of merit must only be qualified as in the specialty at issue through part (b) of the statute.

The Defendants would have you believe that there is a matching requirement of all specialties under the expert witness statute. However, this interpretation goes against the clear and unambiguous language of § 2169.

The purpose and intent of the expert witness statute has already been acknowledged by the Appeals Court. Most recently in *Tate v Detroit Receiving Hospital*, 249 Mich App 212; 642 NW2d 346 (2002), the Michigan Court of Appeals explains the purpose of § 2169 is to insure doctors have firsthand practicing experience of the issues involved.

In *Tate v Detroit Receiving Hospital,* 249 Mich App 212; 642 NW2d 346, makes clear that the Court in *McDougall,* "failed to correctly interpret and apply § 2169's provisions. In fact, [the Michigan Court of Appeals] find[s] that the trial court's strained reading of the statute actually defeats its true purpose." In *Tate*, the decedent, was admitted to defendant hospital after suffering a stroke. In the course of plaintiff's treatment, a urinary catheter was inserted. The hospital's employees noted the possibility of a urinary tract infection, but the decedent was transferred from the defendant hospital without any treatment for the possible infection. The decedent later suffered a seizure and went into a coma where his condition deteriorated and eventually he died. The *Tate* Court quoting from *McDougall,* 961 Mich 15, 25; 394 NW2d 148 (1998), and quoting from *McDougall v Eliuk,* 218 Mich App 501, 509, N1; 554 NW2d 56 (1996), that the Legislature enacted MCL 600.2169 to:

> [M]ake sure that expert witnesses actually practice or teach medicine. In other words, to make sure that experts will have firsthand practical expertise in the subject matter about which they are testifying. In particular, with the malpractice crisis facing high risk specialists, such as neurosurgeons, orthopedic surgeons and

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> OB/GYN's, this reform is necessary to insure that in malpractice suits against specialists, the expert witnesses actually practiced in the same specialty. This will protect the integrity of our judicial system by requiring real experts instead of "hired guns". *Tate* at 4.

Furthermore:

> Certainly § 2169 cannot be read or interpreted to require an exact match of every board certification held by a defendant physician. Such a "perfect match" requirement would be an onerous task and in many cases make it virtually impossible to bring a medical malpractice case. *Tate* at 4.

Thus, this Court has already recognized that board certification and specialities of Defendants and expert witnesses are not required to match. It is only necessary that Plaintiff's expert be qualified in the area which Defendant was negligent.

F. Dr. Brown Specializes in Vascular Surgery, however, no Board Certification in that Specialty Exists.

DR. OTTO BROWN was practicing in the field of vascular surgery at the time of the malpractice against decedent, FRED GROSSMAN. DR. BROWN holds himself out to the public as a specialist in the field of vascular surgery. DR. BROWN has a board certification in surgery from the American Board of Surgery. Further, Defendant, DR. BROWN, has received a Certificate of Special Qualifications in the area of vascular surgery which is granted by the American Board of Surgery.

DR. BROWN attempts to create a board certification for the field of vascular surgery where none exists. The medical community has defined 24 specialty boards which grant board certifications in their 24 respective fields. None of those 24 medical boards are for vascular surgery. Vascular surgery, as already explained, is part and parcel of the field of general surgery. Vascular surgery is a required area of knowledge for any general surgeon to be granted board certification. While DR. BROWN's Certificate of Special Qualifications is nice for his curriculum vitae or the wall of his office, it has no effect upon the reading of the expert witness

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statute.

Both Plaintiff's experts Dr. Zakharia and Dr. Gradman, **(Appendix p. 8b-11b)** have signed Affidavits stating that no "board certification" on vascular surgery exists (Dr. Zakharia's signed Affidavit cannot be found. See Trial Court record). Dr. Gradman further expanded on the topic during his deposition on June 3, 2002:

Q: Describe your practice.

A: I practice exclusively peripheral vascular surgery.

* * * *

Q: And after your residency in general surgery, you did additional study –

A: Yes.

Q: – in the area of vascular surgery?

A: Correct.

Q: Explain to me what that was.

A: It was a one-year fellowship in peripheral vascular surgery.

Q: Where was it?

A: At Cedars-Sinai Medical Center.

Q: You're board certified in general surgery?

A: Correct. **(Appendix p. 1b-2b)**

* * *

Q: Now, you have some special qualifications in general vascular surgery?

A: Yes.

Q: Tell me what those are.

A: Under the aegis of the American Board of Surgery, a

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certificate was awarded for – at the time I took it, was called special cert. qualifications in general vascular surgery. **(Appendix p. 2b-3b)**

* * *

Lastly, in Defendant's deposition of Dr. Gradman, the defense attorney asks whether he is "board certified" in anything besides "general surgery", even though, the defense counsel had previously asked about Dr. Gradman's special qualification:

Q: You're not board certified in any other area besides general surgery?

A: Correct. **(Appendix p. 7b)**

Defense counsel acknowledges in his own line of questioning that the special qualification in vascular surgery is not a "board certification."

G. Strict Construction of the Expert Witness Statute.

This Honorable Court over the past ten years since the new Judiciary Act has been put in place, has taken a very strict view of the relative statutes including the expert witness statute. Where the Legislature has chosen not to include or speak on certain aspects, this Court has not expanded the words of the Legislature. The same can be said in the matter currently before this Court. The Legislature having worked hard to construct the expert witness statute specifically used the words specialist and "board certified". Sub-specialties and Certificates of Special Qualification were around for more than ten years prior to the time of the Legislature's construction of MCL 600.2169. It can therefore be assumed that their decision to leave out specific references to sub-specialties and special qualification-certificates in Line 2 of (1)(a) was intentional. Further, nowhere within the plain and ordinary meaning of the words "specialist", "specialty", or "board certified", can one derive that it includes sub-specialties or Certificates of Special Qualification.

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Specialty is defined by the *American Heritage Dictionary of the English Language, 4th Edition 2000*, < Http://dictionary.reference.com/search?q=specialty >:

1. A special pursuit, occupation, aptitude, or skill;

2. A branch of medicine or surgery, such as cardiology or neurosurgery, in which a physician specializes. *Id.*

Further, the medical dictionaries define specialty as:

> The particular group of diseases or branch of medical science on which a health professional concentrates. *Steadman's Concise Medical Dictionary, 2d Ed, 1994*, pg. 941.

A specialist is defined as:

> A physician whose practice is limited to a particular branch of medicine or surgery, especially one who is certified by a board of physicians. *American Heritage Dictionary of the English Language, 4th Ed., 2000,* <HTTP://dictionary.reference.com/search?Q=specialtist >

Further, we must look at how the terms "board certified" is defined by the medical community. *Steadman's Medical Dictionary, 27th Ed., 2000,* page 107, defines "board certification" as:

> The process by which a person is tested and approved to practice in a specialty field, especially medicine, after successfully completing the requirements of a board of specialists in that field. For a physician, board certification is required in order to practice in a hospital.

However, the most important manner in determining the meaning of particular words, is the manner in which they are used in context. The American Board of Medical Specialties, over the past 18 years, has separated board certifications from added or special qualifications. In the American Board of Medical Specialities Policy Statement, **(Appendix p. 35b)** it states that in 1985 the American Board of Medical Specialties authorized a new type of certification "added qualifications". The ABMS goes on to state that in order to practice in a particular subspecialty,

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no special certification is needed. A diplomate having passed his board certification is completely qualified to practice in any specialty and/or subspecialty of that particular board certification which, he holds.

> There is no requirement or necessity for a diplomate in a recognized specialty to hold special certification in a subspecialty of that field in order to be considered to be qualified to include aspects of that subspecialty within a specialty practice. Under no circumstances should a diplomate be considered unqualified to practice within an area of a sub-specialty solely because of lack of subspecialty certification.
>
> Special certification in a sub-specialty field . . . . has not been created to justify a differential fee schedule or to confer other professional advantages over other diplomate not so certified. < Http:// www.abms.org/policy.asp> (Last accessed June 19, 2003).

Lastly, the ABMS states that they review board certifications and subspecialty certifications separate from one another:

> The ABMS shall review on a regular basis all basic board certifications and all subspecialty certifications. *Id.*

The American Board of Medical Specialties is the chief source for the designation of board certifications within the medical community.

H. Plaintiff's Expert Witness is Required to be a Specialist Under § (b) of the Expert Witness Statute.

Defendants' interpretation of MCL 600.2169(a)(1), attempts to expand the expert witness statute to unprecedentive heights. Defendants wish to create more procedural hoops for a plaintiff to jump through, even where no such requirements were contemplated or placed in the statute by the Legislature.

Defendants argue that under a strict statutory application of MCL 600.2912d and more importantly, MCL 600.2169, Dr. Zakharia fails to meet the qualifications set forth to sign Plaintiff's Affidavit of Merit against Defendant because he is not a specialist in vascular surgery.

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Such a position is simply untrue. Dr. Zakharia is "board certified" by the American Board of Surgery. Dr. Zakharia is also "board certified" in thoracic surgery by the American Board of Thoracic Surgery. Dr. Zakharia's additional qualifications and specialty in thoracic surgery does not limit his board certification in general surgery or his specialty in the area of vascular surgery.

DR. BROWN's position is only valid if a special certificate is the same as board certification. However, that position, as outlined above, is incorrect and a position not authorized by the medical community.

Therefore, Dr. Zakharia's qualifications are not analyzed under § 1(a) of the expert witness statute. A textous reading of the statute reveals that, "board" refers to one of the 24 ABMS member boards such as the American Board of Surgery and not the Certificate of Special Qualification in vascular surgery given by the ABS. As previously discussed, if the Legislature intended to require Certificates of Special Qualification to be the same as the "board certified" requirement, the Legislature could very easily have included sub-specialists and special qualifications in the statute, but this is not the case.

Dr. Zakharia, in the course and scope of his practice, is a recognized specialist in the field of vascular surgery. At his deposition Dr. Zakharia explained that he has both the recognized training and experience as a vascular surgeon over the past 30+ years:

Q: You did a residency in general surgery?

A: General and vascular surgery.

Q: And vascular surgery?

A: Yes.

Q: When you say, "general and vascular surgery", did you do a rotation in vascular surgery?

A: Yes. Actually, my training was very much direct in vascular surgery because the centers I worked were very

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heavily oriented towards vascular work like at Baylor and Case Western where I work with two of the presidents of the vascular society, Simeoni & Austin, and, actually, our work really was very heavy loaded in vascular surgery.

* * *

Q: How long were those rotations?

A: Well, most of my years at Baylor was in vascular and at Case Western, half of my residency was in vascular surgery. **(Appendix p. 13b-14b)**

Furthermore, Dr. Zakharia's thoracic surgery residency included peripheral vascular surgery which is what DR. BROWN practices:

Q: When we talk about vascular surgery, do you differentiate between cardiovascular and just vascular surgery?

A: In general surgery, we do what you call peripheral arteries and veins, mainly, carotids, abdominal aneursyms, vein surgery.

When you do cardiac surgery, you do thoracic surgery, it encompasses everything in the chest, the heart, the blood vessels that connect to the heart, the aortic, the descending, and the lungs and the esophagus.

Q: Was your training in both peripheral vascular surgery and cardiothoracic surgery or cardiovascular surgery?

A: Yes, at that time in my training, when I did thoracic surgery at the University of Miami, the thoracic surgeons did all the peripheral vascular surgery at the VA Hospital. . . . . so that training also included peripheral vascular. **(Appendix p. 14b)**

Dr. Zakharia currently holds privileges to practice vascular surgery at approximately seven hospitals.

Q: You have privileges to do surgery in this area [vascular]?

A: Yes. **(Appendix p. 14b)**

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Dr. Zakharia has had privileges to perform carotid endarterectomies, the procedure involved in this case, for the past 14 to 15 years.

> Q: I should say, currently, do you have privileges at each of these hospitals to perform carotid endarterectomies?
>
> A: For the last 14, 15 years. **(Appendix p. 15b)**

Lastly, a majority of Dr. Zakharia's professional time is spent in the work of vascular surgery.

> Q: So of the three areas, cardiac, lung, and peripheral vascular, they are about even, about a third of your practice each?
>
> A: Yes, sir. Very roughly, so, yes.
>
> * * *
>
> Q: Since 1989, your time has been evenly divided between cardiac, lung, and peripheral vascular surgery?
>
> A: I would say evenly in a very gross way. I can't remember when I was doing 4 or 5% here but, in general, yes. **(Appendix p. 13b)**

Dr. Zakharia has the recognized training, education, qualifications and as required by § 2169(b), was actively practicing in the field of vascular surgery at the time of the occurrence and is therefore, a specialist in the field of vascular surgery qualified to sign Plaintiff's Affidavit of Merit and provide testimony concerning the standard of care of vascular surgery at the time of this incident.

I. Evidence by Defendant is Unconvincing, Unpersuasive, and Fails to Demonstrate that a Certificate of Special Qualification Granted by the American Board of Surgery, is a Recognized Board Certified Specialty.

An examination of the "evidence" Defendants submit in support of their assertion that Dr. Zakharia is not qualified to sign the Affidavit of Merit against DR. BROWN and offer expert testimony pertaining to the standard of care of a vascular surgeon, fails to prove that a board

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certification of vascular surgery exists. Defendants submitted DR. BROWN's Certificate of Special Qualifications in General Vascular Surgery from the American Board of Surgery. **(Appendix 116a)** A Certificate of Special Qualification in Vascular Surgery from the ABS has different standards than a general board certification by one of the 24 governing boards.

None of the Defendants' remaining Exhibits in any way, which include the American Board of Thoracic Surgery Booklet of Information **(Appendix p. 126a)**, the ABS Brochure on information regarding requirements and examinations for certifications in vascular surgery, the ABS booklet of information for board certification in general surgery, **(Appendix 136a)**, or an issue of the Journal of Vascular Surgery, **(Appendix p. 161a)**, demonstrates that vascular surgery is a board certification specialty.

Furthermore, the American Board of Surgery recently released a statement from the June 2001 meeting of the Directors of the American Board of Surgery which can be found on their website. **(Appendix p. 47b)** <http://www.abssurgery.org/indvascular.htm> (Last accessed on June 19, 2003). The statement provided by the American Board of Surgery states that they do not support the creation of an independent Board of Vascular Surgery. The Board's statement makes reference that a Certificate in Vascular Surgery has been in place since 1983, but no board. In 1998, the American Board of Surgery addressed some of the concerns of the discipline of vascular surgery and other sub-specialties of surgery by allowing each sub-specialty to manage their own affairs and to erect their own futures, but as part of a common board (American Board of Surgery), sees construct. Both the ABMS and the ABS have clearly articulated that no board of vascular surgery exists.

Vascular surgery is merely a sub-field of surgery. A doctor, if he or she wishes, may apply for a Certificate for Special Qualifications in vascular surgery granted by the American Board of Surgery. However, nothing that DR. BROWN submits shows that vascular surgery is a

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recognized board certifying specialty. As such, Dr. Zakharia need not obtain a certificate in vascular surgery to testify against DR. BROWN. Since, no board of vascular surgery exists, Dr. Zakharia must meet the standards for an expert witness outlined in subsection 1(b) of the statute. This requires Dr. Zakharia to be a specialist in the area of vascular surgery having a clinical or academic practice. Dr. Zakharia has had either or both a clinical and/or an academic practice in vascular surgery for the past 35 years. Defendant argues that one of the purposes of the Affidavit of Merit requirement of MCL 600.2912d is to deter frivolous medical malpractice claims. Plaintiff agrees with that premise, but, MCL 600.2912d was not put in place to make plaintiffs jump through hoops in order to bring a malpractice suit against a doctor, which he or she feels injured her as a result of malpractice and/or negligence. The Affidavit of Merit was put in place to require a doctor who has "firsthand experience." Nobody, not even the Defendants, can rationally argue that Dr. Zakharia has not been, and still today is not, a practicing vascular surgeon.

J. Conclusion

No "board certification" exists in vascular surgery. Vascular surgery is a sub-specialty of surgery. The ABS offers a certificate of special qualification in vascular surgery. However, a certificate of special qualifications does not rise to the level of "board-certified" requirement outlined in Line 2 of § 2169(1)(a).

Therefore, Dr. Zakharia's qualifications are analyzed under (2)(b) of the statute and as a specialist in the field of vascular surgery, Dr. Zakharia is qualified to sign Plaintiff's Affidavit of Merit.

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II. Plaintiff had a reasonable belief that Plaintiff's expert was qualified to sign Plaintiff's Affidavit of Merit pursuant to MCL 600.2169.

As already previously discussed, Dr. Zakharia is a qualified specialist in vascular surgery and therefore, was qualified under the expert witness statute to sign and offer testimony with regards to the standard of care of a vascular surgeon against DR. OTTO BROWN. However, even if Dr. Zakharia does not meet the qualifications to be an expert in the area of vascular surgery, Plaintiff and or Plaintiff's attorney had a reasonable belief that he was qualified, which the trial court found.

A. Standard of review.

Decisions on motion for summary disposition are subject to a *de novo* review. *Miller v Farm Bureau Mutual Insurance Co*, 218 Mich App 221; 553 NW2d 371 (1996).

B. A Reasonable Belief that Dr. Zakharia is a Specialist in the Field of Vascular Surgery.

MCL 600.2912d requires a plaintiff to file an affidavit of merit with his or her complaint signed by a "health professional who the **plaintiff's attorney reasonably believes** meets the requirements of an expert witness under § 2169." (Emphasis added). The Court of Appeals recently discussed this issue in *Decker v Flood*, 248 Mich App 75; 638 NW2d 163 (2001). In his concurring opinion to *Decker*, P.J. Neff explains even if plaintiff's counsel is mistaken, provided their belief or mistake was reasonable, the case should not be dismissed, and plaintiff's affidavit of merit if valid:

> The standard set forth by the Legislature is clearly one of "reasonable belief." Applying the language of the statute, I conclude that if counsel reasonably, albeit mistakenly, believed that the affiant qualified as an expert witness under § 2169, then the trial court's subsequent finding to the contrary would not have been fatal to plaintiff's case, i.e., a basis for summary disposition in favor of defendants. *Id.*

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The decision in *Decker* makes it clear that Plaintiff's counsel merely has to have a reasonable belief, even if it is a mistaken belief, that Dr. Zakharia was qualified to testify.

In the current action, reasonable belief, mistaken or not, clearly exists. When asked, Dr. Zakharia identifies himself as a doctor of vascular surgery. Plaintiff has used Dr. Zakharia on numerous occasions, and each time Dr. Zakharia states that he specializes in the area of vascular surgery. (Deposition Transcript of Dr. Zakharia is *Stewart v Michael Israel, M.D., et al,* pgs. 6 and 10 and *Schultz v Dr. Chan, et al.*, pgs. 6-11).

On the issue of Defendant, DR. BROWN's claim that his Certificate of Special Qualifications rise to the level of board certification. Plaintiff has had a number of physicians testify that DR. BROWN's belief is untrue. Plaintiff has provided Affidavits by Dr. Zakharia and Dr. Gradman, both members of the American Board of Surgery, that no such Board of Vascular Surgery and/or board certification in vascular surgery exists.

Further, Dr. Zakharia has testified that if a subspecialty of vascular surgery exists within the American Board of Surgery that he has been grandfathered into the subspecialty as a result of the subspecialty not existing until the mid-1980's. Dr. Zakharia has been continuously practicing vascular surgery since the 1960's. Dr. Zakharia's curriculum vitae designates him as a specialist in the area of vascular surgery for the last 35 years.

Furthermore, the American Medical Association has on their website, an information sheet on every medical doctor. Plaintiff's counsel's custom is to check each defendant sheet with that of Plaintiff's expert's qualifications. One area listed is board certifications. DR. BROWN lists his board certification as general surgery. (**Appendix p. 50b-53b**) DR. BROWN does not display any board certification in vascular surgery, nor a Certificate of Special Qualification which, he holds. Dr. Zakharia's board certification is also designated as general surgery. Therefore, according to the American Medical Association, while not conclusive, strongly

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demonstrates that no board certification in vascular surgery exists. Lastly, in a search upon the American Medical Association, not once did a single doctor come up as being board certified in vascular surgery. (Last checked July 17, 2003).

DR. BROWN, at the time of malpractice was merely practicing in the area of vascular surgery. As evidence presented already shown, Dr. Zakharia is qualified as a specialist in the field of vascular surgery, and if not, Plaintiff's counsel had a reasonable belief to think that Dr. Zakharia was qualified at the time of filing Plaintiff's Affidavit of Merit.

C. Dismissal is Inappropriate

Defendants continued attempt to apply the decision in *Scarsella v Pollak*, 461 Mich 547, 607 NW2d 711 (2000) will not make it anymore applicable. The decision in *Scarsella* simply does not apply. The Court in *Scarsella*'s limited holding only applies to cases where a Plaintiff has wholly omits to file an affidavit of merit in a medical malpractice action and "that this holding does not extend to a situation in which a court subsequently determines that a timely filed affidavit is inadequate or defective." *Scarsella* at 553. Courts and cases one after another have quoted the narrow language employed in *Scarsella*. See *Holmes v Michigan Capital Medical Center*, 242 Mich 703, 713; 620 NW2d 319 (2000); *Ericson v Pollak*, 110 F Supp 2d 582, 586 (Mich, 2000); *Derfiny v Bouchard*, 128 F Supp 2d 450 (Mich, 2001).

In *Ericson v Pollak*, 110 F Supp 2d 582, 586 (Mich, 2000), the Court answered several issues regarding the affidavit of merit requirement. *Ericson* quoting from Senate Bill 270, which later became 1993 P.A. No. 78 in part codified as MCL 600.2912d indicates the purpose for the tort reform measures are:

> to discourage unjustified medical malpractice lawsuits and reduce the costs of the medical malpractice liability system, thus helping to contain spiraling health care costs, stem the fight of physicians out of Michigan, and assure the citizens of this state access to affordable health care... *Id* at 586.

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Further, the Court notes that the purposes outlined by the Legislature are "best served by taking a broad approach to the requirements of the affidavit of merit. *Ericson* at 587.

Also, the requirement of an affidavit of merit is to deter frivolous medical malpractice claims. The Court references this as one reason why the requirements must be broadly interpreted. Michigan's procedural requirements, including the affidavit of merit are also designed, like Florida's requirements, to deter frivolous medical malpractice claims...It is precisely because the requirements make it more difficult for the Plaintiff to get his or her case before a jury that the requirements should be broadly interpreted. Indeed, a strict construction of the requirements risks impinging a Plaintiff's right to jury trial guaranteed by the Seventh Amendment. It goes on to state:

> Thus, an affidavit of merit that substantially complies with § 2912d is all that is required under the statute, is in keeping with legislative intent and is mindful of the Constitution. *Id.*

Here, Plaintiff has complied completely with the affidavit requirements set forth in MCL 600.2912d. Plaintiff outlined all aspects of Plaintiff's case against Defendants, including DR. OTTO BROWN. Plaintiff got a qualified expert under MCL 600.2169, Dr. Zakharia to sign Plaintiff's Affidavit of Merit, and even if the Court decided that Dr. Zakharia is not qualified under § 2169, Plaintiff had both a reasonable belief that Dr. Zakharia was qualified and Plaintiff has substantially complied with the requirements laid out in § 2912d.

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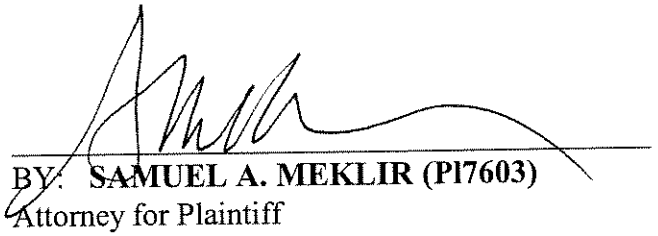
RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Plaintiff-Appellee, REBECCA GROSSMAN, as Personal Representative of the Estate of FRED GROSSMAN, Deceased, respectfully requests that the Circuit Court's Order be affirmed. Plaintiff further requests costs and attorney's fees.

Respectfully Submitted,

MEKLIR, NOLISH, FRIEDMAN
& ASSOCIATES, P.C.



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Dated: 6-24-03

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